STATE OF MICHIGAN

COURT OF APPEALS

RENEE MICKENS, Plaintiff-Appellant,	UNPUBLISHED July 31, 2003
v	No. 208269 Wayne Circuit Court
DEXTER CHEVROLET COMPANY, a/k/a HARRY SLATKIN BUILDERS, d/b/a SHERWOOD HEIGHTS APARTMENTS, and HARTMAN AND TYNER, INC., d/b/a SHERWOOD HEIGHTS APARTMENTS, Defendants-Appellees.	LC No. 96-616853-NO ON SECOND REMAND

Before: Sawyer, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

In lieu of granting leave to appeal, our Supreme Court vacated our decision, for a second time, and remanded this case "for reconsideration in light of the objective standard set forth in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517 [; 629 NW2d 384] (2001)." We, again, reverse the trial court's order granting defendants' motion for summary disposition.

It has long been the law in Michigan that landowners have a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on their premises that the owner knows or should know invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty typically, however, does not extend to open and obvious dangers. In *Lugo*, our Supreme Court, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), described "open and obvious dangers" as follows:

> [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Lugo*, *supra* at 516.

In other words, a danger is open and obvious if an average person of ordinary intelligence should have discovered the condition upon casual inspection because the danger was "so obvious." *Lugo*, *supra*, quoting *Bertrand*, *supra* at 611; *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

In this case, whether the wet stairway that plaintiff fell on was an open and obvious danger is the dispositive issue. To be deemed an open and obvious danger, plaintiff must either have known the stairway was wet or be charged with such knowledge, even if she did not know that the stairway was wet, because it was so obvious. In our previous opinion we explained why there is a genuine issue of material fact as to whether plaintiff, an invitee, knew that the stairway was wet:

> Under MCR 2.116(C)(10) the moving party has the initial burden of specifically identifying the issues on which there are no disputed facts and supporting its position with documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). Here, in support of their motion, defendants submitted plaintiff's statement to an insurance adjuster and a portion of her deposition testimony. However, both the statement and testimony are inconclusive as to whether plaintiff knew that the stairs were wet before attempting to ascend them. Defendants never specifically asked plaintiff whether she knew if the stairs were wet before attempting their ascent. Read in context, plaintiff's responses could reasonably be interpreted as indicating that she did not know until after she fell that the stairs were wet. Further, in an affidavit submitted in support of her motion for reconsideration, plaintiff asserted that she did not see or know that the stairs were wet. Because the statement and deposition testimony were not clear and unequivocal, plaintiff's affidavit is not deemed contradictory and is properly considered. See *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 154-155; 565 NW2d 868 (1997). [*Mickens v Dexter Chevrolet Co*, unpublished opinion of the Court of Appeals, issued May 3, 2002 (Docket No. 208269) (footnote omitted.)].

After reconsideration of this issue whether plaintiff knew that the stairway was wet, our opinion does not change.

Next, we consider whether plaintiff should be charged with the knowledge that the stairway was wet and, thus, dangerous. We must determine whether the danger was "so obvious that the invitee might reasonably be expected to discover" it. See *Riddle*, *supra*. As noted in our previous opinion, "[t]he record evidence fails to reveal any characteristics or qualities about the stairs that would cause an average person to discover that they were wet," *Mickens*, *supra*, slip op at 2. The wetness of the stairway was *the* dangerous condition, not the stairs themselves. This is not a case in which plaintiff tripped on some stairs, stepped into a pothole, slipped on snow and ice, or was injured by another condition that was plainly there to be seen. Inherent in the very nature of stairs is the obvious risk of tripping. Here, however, plaintiff allegedly slipped on wet stairs and defendant provided no evidence that plaintiff should have anticipated or known that the stairs were wet and, thus, slippery. We refuse to declare as a matter of law that this plaintiff should have anticipated dangerously wet stairs, located inside of a building, simply because it was raining outside the building, especially since there was a rug positioned in the entryway of the doorway. Further, in this case, "the evidence presented is conflicting and inconclusive regarding both the time of the incident and the time that it began to rain." *Mickens*, *supra*, slip op at 3 (footnotes omitted).

In light of our Supreme Court's directive to, again, reconsider this case in light of *Lugo*, *supra*, we deem it necessary to address the implication that our previous opinion did not conform to such directive. In *Lugo*, the defendant essentially argued that the pothole in which plaintiff stepped into was, by its very nature, an open and obvious condition. The trial court agreed with defendant, as did our Supreme Court which held that, as a matter of law, ordinary potholes are typically open and obvious conditions. *Id*. at 520. The Court held, "[l]ikewise, the evidence in the present case reflects that plaintiff tripped and fell on a common pothole because she failed to notice it." *Id*. at 522. The Court went on to hold, "[h]owever, in resolving an issue regarding the open and obvious doctrine, the question is whether the condition of the premises at issue was open and obvious and, ***if so***, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous." *Id*. at 523 (emphasis supplied). The Court further held, "it is important for courts deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Id*. at 523-524.

According to *Lugo*, the first step in an "open and obvious" analysis is, of course, determining whether the condition at issue was, in fact, an open and obvious condition. *Id*. at 523. If it was not, no further analysis is possible. If it was an open and obvious condition, *then* the court must consider whether there were special aspects that made the open and obvious condition unreasonably dangerous. *Id*. at 517. "[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Id*.

Here, on the record before this Court and focusing on the objective nature of the condition, we cannot conclude that the wet stairway was an open and obvious condition or, more particularly, that the wetness on the stairway was open and obvious. In support of their argument to the contrary, defendant relies on a plethora of factually distinguishable and, thus, unpersuasive cases that involve (1) falling off of an unrailed rooftop porch—an open and obvious condition—*Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 694; 650 NW2d 343 (2001); (2) tripping on common and dry stairs—an open and obvious condition—*Liang v Liase*, unpublished opinion of the Court of Appeals, issued March 26, 2002 (Docket No. 206647), *Malloy v Forest Row Limited Partnership*, unpublished opinion of the Court of Appeals, issued March 22, 2002 (Docket No. 229112), *West v Olympia Entertainment, Inc*, unpublished opinion of the Court of Appeals, issued March 19, 2002 (Docket No. 229044); (3) slipping on ice and snow—an open and obvious condition—*Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002), *Corey v Davenport College of Business*, unpublished opinion of the Court of Appeals, issued April 26, 2002 (Docket No. 206185), *Evers v Aldrich*, unpublished opinion of the Court of Appeals, issued January 22, 2002 (Docket No. 223690); (4) skiing into a timing shack located on a ski slope—an open and obvious condition—*Anderson v Pine Knob Ski Resort, Inc*, unpublished opinion of the Court of Appeals, issued March 26, 2002 (Docket No. 227832); and (5) stepping into a pothole—an open and obvious condition—*York v Eagle Party Store Shop, Inc*, unpublished opinion of the Court of Appeals, issued January 22, 2002 (Docket No. 227811). On the record presented to this Court, the wet stairway involved in this case was not an open and obvious condition. Accordingly, defendants did not meet their burden of establishing that no genuine issue of material fact exists regarding whether the wet stairs posed an open and obvious danger and the trial court's dismissal of this action must be reversed. See MCR 2.116(C)(10).

Because our entire previous opinion was vacated, we must again consider the trial court's alternate finding that there was no genuine issue of material fact regarding whether defendants had the requisite notice to remedy the condition. We adopt the reasoning from our previous opinion in this regard:

> In their motion for summary disposition defendants argued, first, that plaintiff's claim that she fell on wet stairs at 8:30 p.m. lacked credibility because it did not begin to rain until 10:00 p.m. and, second, if she fell at 10:00 p.m., defendants did not have notice of the condition. However, the evidence presented is conflicting and inconclusive regarding both the time of the incident[1] and the time that it began to rain.[2] Further, neither this Court nor the trial court may make credibility determinations or resolve questions of fact on a motion for summary disposition. See *Haliw v Sterling Heights*, 464 Mich 297, 315; 627 NW2d 581 (2001); *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Consequently, there is a genuine issue of material fact as to whether defendants had actual or constructive notice that the stairs were wet. See *Bertrand*, *supra*.

In consideration of our resolution of this matter we need not consider plaintiff's other issue on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

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[1] An accident report and plaintiff's deposition testimony indicate that plaintiff fell at 8:30 p.m. but plaintiff's statement to an insurance adjuster indicates that she fell at 10:00 p.m.

[2] The three sources of weather data that defendants submitted in support of their motion do not include legends. The records presumably referencing Detroit Metropolitan Airport indicate that it was cloudy from 8:00 p.m. through 11:00 p.m. and that there was thunder at 10:00 p.m. The record does not chart precipitation. The records presumably referencing Detroit City Airport indicate that data was missing for the 8:00 p.m. and 9:00 p.m. hours and, apparently, that a thunderstorm occurred at 10:00 p.m. The record does not chart precipitation. The records from National Climatic Data Center indicate that at 9:00 p.m. there was precipitation but no precipitation or thunderstorm is noted for the hours of 10:00 p.m. and 11:00 p.m.